Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Improving Competitive Broadband Access to Multiple Tenant Environments	)	GN Docket No. 17-142
	)	

REPLY COMMENTS OF NCTA – THE INTERNET AND TELEVISION ASSOCIATION

NCTA – The Internet and Television Association hereby submits reply comments on the Notice of Inquiry ("NOI") in the above-captioned proceeding.

I. RESTRICTING THE CONTRACTUAL ARRANGEMENTS BETWEEN BROADBAND PROVIDERS AND MTE BUILDING OWNERS WOULD *IMPEDE* COMPETITIVE BROADBAND ACCESS TO MTEs.

The initial comments in this proceeding confirm that even if the Commission had authority to regulate and restrict the varied and diverse contractual arrangements between the owners of multiple tenant environments ("MTEs") and providers of broadband service, there is no reason it should do so. In fact, there are many good reasons highlighted in the record for why the Commission should *not* regulate or restrict such arrangements. In particular, the Commission's objective of fostering competitive broadband access to multiple tenant environments ("MTEs") would be impeded, not promoted, by restricting the various contractual arrangements between broadband providers and MTE building owners identified in the Notice of Inquiry.

NCTA explained in its initial comments why this is the case. The record shows that this is not simply the viewpoint of the franchised cable operators represented by NCTA, but also the experience of new entrants seeking to compete with established providers and of MTE building owners.

For example, Hotwire Communications, LLC – which "is often the third or fourth provider . . . in a market, facing competition from incumbent providers" – states that its "ability to continue to deploy broadband infrastructure and services to MTEs is dependent upon a stable regulatory environment," and that, in its view, "the marketplace today is working well, allowing companies like Hotwire to bring the benefits of ultrafast broadband to residents of MTEs and no regulatory intervention is warranted."[1] Hotwire specifically notes that, "[w]hile bulk service agreements are not the only model for sustainable fiber deployment, they are a critical one to Hotwire and to many other similar small and mid-sized providers."[2] With respect to exclusive wiring agreements, Hotwire notes that such arrangements are often used "by smaller operators attempting to make a sustainable deployment and investment in new technology to MTEs."[3] It explains that, "[i]f service providers are forced to share their wiring, service providers would not be incentivized to invest in new infrastructure, but simply use existing infrastructure and provide no more than the quality of product that the existing infrastructure is able to support, which is unlikely to be high-performance fiber."[4]

MTE owners – who share an interest in ensuring that their tenants have attractive options for Internet, video and voice services – agree that arrangements such as bulk billing, exclusive wiring, exclusive marketing, and door fees and revenue sharing facilitate this outcome. One large group of rental apartment companies representing more than 1,286,000 apartment homes noted that "regulating exclusive marketing, bulk billing, revenue sharing and exclusive wiring arrangements could actually raise prices, result in degraded services, decrease competition and

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1 Comments of Hotwire Communications, LLC at 1-2.

2 *Id.* at 4. *See also* Comments of Summit Broadband.

3 *Id.* at 7.

4 *Id.* at 7-8.

slow broadband deployment in our buildings."[5] While some commenting parties suggest that these types of arrangements deny tenants a choice among multiple providers, this group of apartment companies notes that "the majority of our buildings provide residents with more than one option for video and broadband services"[6] irrespective of the existence of such arrangements. RealtyCom Partners similarly points out that of the 1,800 apartment communities that its clients own or manage, "94% of these apartment communities have two or more Carriers providing service and 72% have agreements in which exclusive on-site marketing rights have been granted to one of those Carriers."[7] In any event, virtually no parties dispute that bulk billing arrangements enable MTEs to offer tenants service at a price far below prevailing competitive retail rates.

INCOMPAS points to its member Google Fiber's experience to argue that, contrary to the experience of Hotwire and the building owners cited above, exclusive wiring is neither useful nor necessary to promote deployment of facilities and service to MTEs. But the fact that Google has the resources and ability to deploy facilities in MTEs without the economic assurances of exclusive wiring agreements does not mean that the Commission should preemptively bar other providers with different business models and less capital from entering the marketplace and attempting to compete. Not all service providers have the same business plan, and it is hardly surprising that Google's economic imperatives and incentives for offering service in MTEs differs from those of other new entrants as well as incumbents. Moreover, INCOMPAS ignores the fact that exclusive arrangements can provide strong incentives for maintaining and upgrading

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5 Comments of Apartment and Investment Management Company (Aimco), et al. at 1. *See also* Comments of The National Multifamily Housing Council at 3-7.

6 *Id.*

7 Comments of RealtyCom Partners at 3.

wiring, nor does INCOMPAS account for the technical issues with the sharing of wiring by different providers.[8]

INCOMPAS and others also maintain that door fees and revenue sharing agreements negotiated by providers and building owners should be prohibited because they supposedly are designed to preclude competitors from serving MTEs. In its view, building owners who have revenue sharing agreements with a high-revenue service provider have an incentive to discourage competition from alternative providers who may generate lower fees. RealtyCom Partners demonstrates the absurdity of this claim, noting that "MTE owners are in fierce competition with each other to win and retain residents," and showing that the incremental revenues that building owners receive from door fees or revenue sharing agreements are a small fraction of what the owner would lose in rent were a resident to find a more attractive place to live:

> Any owner that could be lured into saddling residents with uncompetitive service for some pocket change from a shoddy Carrier would witness a mass migration of residents to nearby properties with less short-sighted management.[9]

Compensation to MTE owners is a common element of the marketplace negotiations between the owners and service providers in return for use of the owners' facilities, costs associated with such use, and other negotiated provisions. Also, as RealtyCom explains, revenue sharing and door fee arrangements give MTE owners the ability to monitor – and service providers the opportunity to demonstrate – how well particular providers are meeting the needs and demands of building residents: "By evaluating the relative performance of providers, MTE owners can better identify the Carriers that are most (and *least*) valued by residents within a

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8 *See, e.g.*, Comments of NCTA at 4; Comments of Camden Property Trust at 7-10; Comments of Hotwire at 8.

9 Comments of RealtyCom Partners at 7.

market, allowing owners to better satisfy residents' demands at new properties when curating an appealing mix of Carriers at existing properties."[10]

In sum, all the arrangements identified in the NOI – bulk billing, exclusive marketing, exclusive wiring, and door fees and revenue sharing – are elements of negotiations between MTE owners and service providers in a marketplace that is competitive on both sides. While individual service providers and building owners may have different business models and different preferences regarding such arrangements, it is not the government's role to favor one model over another – and therefore one competitor over another -- by precluding the use of particular arrangements. Competition in the marketplace is working to ensure that high quality broadband service is available to MTE tenants on competitive terms and conditions – and, in the case of bulk billing, at prices substantially *below* the community-wide retail prices by using the benefits of bulk purchasing to reduce the per-unit price and obtain better terms.[11]

The Commission should avoid regulation of the MTE marketplace, as such regulation would only interfere with these pro-competitive developments and impede the Commission's objective of fostering broadband access to MTEs. And, as NCTA and others have urged,[12] it should preempt any such regulation by state and local governments.

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[10] *Id.* at 8.

[11] "Residents of properties with bulk billing arrangements generally receive tremendous cost savings for services that are provided with convenience and ease to their living units immediately upon move-in." Comments of RealtyCom Partners at 2.

[12] *See, e.g.*, Comments of NCTA at 10-11; Comments of Camden Property Trust at 11; Comments of Multifamily Broadband Council.

II. THE COMMISSION SHOULD REVISIT ITS DETERMINATION THAT ITS AUTHORITY UNDER SECTION 628(b) EXTENDS TO CONTRACTUAL ARRANGEMENTS UNRELATED TO ACCESS TO PROGRAMMING IN WHICH A CABLE OPERATOR HAS AN ATTRIBUTABLE INTEREST.

While it would be inappropriate for the Commission to restrict marketplace arrangements between MTE property owners and broadband service providers, it would be especially inappropriate to enact restrictions that apply only to some service providers and not to others. As NCTA showed in its initial comments,[13] continuing to interpret the "program access" provisions of Section 628(b) of the Communications Act as authorizing regulation of agreements between cable operators and MTE owners would have precisely this effect. Such an interpretation strays far afield from the original purpose of Section 628, and risks creating further competitive imbalances given that the language of the statute references only cable operators and common carriers, but not other providers – and no commenting parties suggest otherwise. In light of these concerns, even if, as the D.C. Circuit held, the Commission's open-ended interpretation of the literal language of Section 628(b) is permissible, the Commission should take this opportunity to revisit that interpretation and make clear that Section 628 is limited, as Congress intended, to matters of competitive access to satellite-delivered programming in which a cable operator has an attributable interest.[14]

CONCLUSION

For the foregoing reasons, and for the reasons set forth in NCTA's initial comments, the Commission should refrain from initiating a rulemaking proceeding to regulate the terms and arrangements of contractual agreements between broadband providers and MTE owners;

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[13] *See* Comments of NCTA at 8-10.

[14] *See also* Comments of National Multifamily Housing Council at 7-12.

preempt state and local governments from regulating such arrangements; and declare that Section 628(b) is limited to program access regulation.

Respectfully submitted,

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